

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF OSTRANDER )  
ROCK AND CONSTRUCTION )  
COMPANY, INC., )  
Appellant, )  
v. )  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
Respondent. )

PCHB No. 79-66

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal from respondent's order issued under RCW 90.48.120(2) of the Water Pollution Control Act, came on for hearing before the Pollution Control Hearings Board, David Akana, Chairman, and Chris Smith, Member, at Lacey, Washington on August 6, 1979. Hearing Examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its attorney, Vernon J. Guinn. Respondent appeared by Charles W. Lean, Assistant Attorney General. Reporter Randi R. Hamilton recorded the proceedings.

1 Witnesses were sworn and testified. Exhibits were examined.  
2 From testimony heard and exhibits examined, the Pollution Control  
3 Hearings Board makes these:

4 FINDINGS OF FACT

5 I

6 Appellant, Ostrander Rock and Construction Company, Inc., maintains  
7 and operates a surface mine on land it owns adjacent to Coal Creek in  
8 Cowlitz County, Washington. The land adjacent to Coal Creek is very steeply  
9 sloped, which is its natural condition. On the flat above the slope,  
10 appellant has dug a pit in the course of removing basalt which, when  
11 crushed, is the product that the mine produces.

12 Appellant uses explosives to remove the basalt within the pit. By  
13 using timed ignition and reduced charges, the effects of blasting are  
14 mitigated.

15 II

16 Sometime during 1977 or before, appellant diverted a small, unnamed  
17 intermittent stream on the flat above the slope. Its flow was changed  
18 to run parallel to the crest of the slope rather than down the slope as  
19 occurred previously.

20 In December, 1977, an earth slide occurred on the face of appellant's  
21 slope which may have been induced by waters of the diverted stream  
22 percolating downward and re-emerging on the slope face.

23 Following this slide respondent's investigator suggested that  
24 appellant take three steps to protect Coal Creek from further slides on  
25 the slope face. These were: (1) place hay bales alongside Coal Creek;  
26 (2) restore the mid-slope bed of a long abandoned railroad which could

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1 then serve as a bench to interrupt downslope movement of soil or water;  
2 and (3) seed the slope in grass. Appellant accomplished the first two  
3 of these and failed in the third when the grass seed which it placed  
4 washed downslope.

5 In addition, appellant placed large rocks along the crest of the  
6 slope near the pit. Some of these rolled down the slope.

### 7 III

8 In the early morning hours of February 10, 1979, another earth  
9 slide occurred, which is the subject of this appeal. This slide  
10 occurred some 500 feet north of the pit, and south of the site of the  
11 previous slide. Appellant was not conducting blasting operations at  
12 the time of the slide. The intermittent stream, which was implicated  
13 in the previous slide, was not shown to be a direct cause of the slide in  
14 question.

15 The month preceding the slide in question was marked with  
16 alternating temperatures above and below freezing. These, combined  
17 with plentiful rainfall, worked upon and loosened the slope and were the  
18 likely cause of the earth slide. The slide completely blocked and diverted  
19 the flow of Coal Creek into and across a neighboring landowner's  
20 pasture.

### 21 IV

22 Appellant subsequently received a written Order from respondent  
23 (DE 79-192) requiring it to (1) submit a plan to prevent future  
24 water pollution and (2) submit a plan for removing the slide materials  
25 from Coal Creek. From this Order, appellant appeals.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW  
AND ORDER

V

Any Conclusion of Law hereinafter stated which may be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Board comes to these

CONCLUSIONS OF LAW

I

Respondent contends that appellant has violated RCW 90.48.080 of the Water Pollution Control Act which states:

RCW 90.48.080 DISCHARGE OF POLLUTING MATTER IN WATERS PROHIBITED. It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the commission, as provided for in this chapter.

Respondent first contends, but did not prove, that appellant, in diverting the unnamed stream and blasting at its surface mine, substantially contributed to, suffered or allowed the earth slide in question. The slide was probably caused by alternating freezing and thawing coupled with heavy rainfall.

Respondent next contends that the condition of appellant's slope and the earlier slide in 1977 are circumstances under which appellant's failure to take adequate preventive measures amounts to suffering or allowing the instant discharge of pollutants. We reject this contention also. No human activity has been evident, including appellant's diversion of the unnamed stream and blasting, which is causally connected to the slide in question. Accordingly, the portion of the order

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requiring appellant to remove the slide materials should be reversed  
as appellant has not violated RCW 90.48.080.

## II

The respondent's Order is also predicated upon the authority  
of RCW 90.48.120 of the Water Pollution Control Act, which states:

RCW 90.48.120 NOTICE OF DEPARTMENT'S DETERMINATION THAT  
VIOLATION HAS OR WILL OCCUR -- REPORT TO DEPARTMENT OF COMPLIANCE  
WITH DETERMINATION -- ORDER OR DIRECTIVE TO BE ISSUED -- NOTICE.

(1) Whenever, in the opinion of the department, any person shall  
violate or is about to violate the provisions of this chapter, or  
fails to control the polluting content of waste discharged or to be  
discharged into any waters of the state, the department shall notify  
such person of its determination by registered mail. Such  
determination shall not constitute an order or directive under RCW  
90.48.135. Within thirty days from the receipt of notice of such  
determination, such person shall file with the department a full  
report stating what steps have been and are being taken to control  
such waste or pollution or to otherwise comply with the determination  
of the department. Whereupon the department shall issue such order  
or directive as it deems appropriate under the circumstances, and  
shall notify such person thereof by registered mail.

(2) Whenever the department deems immediate action is necessary  
to accomplish the purposes of chapter 90.48 RCW, it may issue such  
order or directive, as appropriate under the circumstances, without  
first issuing a notice or determination pursuant to subsection (1)  
of this section. An order or directive issued pursuant to this  
subsection shall be served by registered mail or personally upon  
any person to whom it is directed. [1973 c 155 § 2; 1967 c 13 § 11;  
1945 c 216 § 18; Rem. Supp. 1945 § 10964r.] (Emphasis added)

Although we have concluded that appellant's blasting and stream  
diversion did not cause the slide in question, such activity nonetheless  
shows direct potential to cause slides in the future. Accordingly,  
the requirement for planning and action to prevent future water pollution  
should be upheld. Because of the objective expertise which it will  
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1 provide, the requirement for participation of a licensed professional  
2 engineer should be upheld in the circumstances of this case.

3 The respondent was correct in issuing its Order under the "immediate  
4 action" provision of RCW 90.58.120(2), supra. It is imperative  
5 that work in connection with the slope be accomplished before  
6 autumn rains impede the use of heavy equipment, which is now a point of  
7 even greater concern because of the time spent in litigation.

8 III

9 Any finding of Fact which should be deemed a Conclusion of Law  
10 is hereby adopted as such.

11 From these Conclusions the Board enters this

12 ORDER

13 The Department of Ecology's Order (DE 79-192) is hereby reversed  
14 as to Part II thereof and affirmed as to Part I thereof; provided, that  
15 Part I(D) shall be initially performed within five working days of  
16 appellant's receipt of this Order with or without the participation of  
17 a licensed professional engineer. Appellant shall take action  
18 according to this initial plan immediately upon receipt of the Depart-  
19 ment's approval, so as to effect all preventive measures possible  
20 before onset of autumn rains. Appellant shall perform Part I  
21 (A), (B), (C), and a final version of (D) with the participation  
22  
23  
24

25 FINAL FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW  
27 AND ORDER

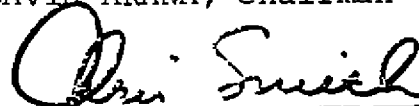
1 of a licensed professional engineer as set forth therein by  
2 October 31, 1979.

3 DONE at Lacey, Washington this 31<sup>ST</sup> day of August, 1979.

4 POLLUTION CONTROL HEARINGS BOARD

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6 DAVID AKANA, Chairman

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8 CHRIS SMITH, Member

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26 FINAL FINDINGS OF FACT,  
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